United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL
with
Affidavit of Service

76-2020

UNITED STATES COURT OF APPEALS

for the Second Circuit

CALVIN WILLIAMS,

Petitioner-Appellant,

-against-

ATTORNEY GENERAL OF THE STATE OF NEW YORK, DISTRICT ATTORNEY FOR THE COUNTY OF KINGS, CORPORATION COUNSEL FOR THE CITY OF NEW YORK, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTIONS, AND PRESIDING JUSTICE OF THE SUPREME COURT, KINGS COUNTY, PART 27,

Respondents-Appellees.

On Appeal from the United States District Court for the Eastern District of New York.

B
P/S

BRIEF FOR RESPONDENTS-APPELLEES

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BRIEF FOR RESPONDENTS-APPELLEES

ISSUES PRESENTED FOR REVIEW

1. Whether it was a deprivation of a constitutional right for the trial court to have instructed the jury, in the absence of an appropriate exception, that the appellant may testify at trial, as opposed to his having a right not to testify, where the court had contemporaneously charged that the jury should draw no adverse inferences from the appellant's failure to have taken the stand.

2. Whether it was a deprivation of a constitutional right for the Assistant District Attorney, in the absence of any objection, to have stated to the jury in response to defense counsel's prior argument concerning an alleged evidentiary defect in the prosecution's case, that the appellant was also in a position to have proved that same fact, which was nevertheless irrelevant to the prosecution.

STATEMENT OF THE CASE

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Hon. Thomas C. Platt), entered January 29, 1976, upon a memorandum and order, which judgment denied a petition for a writ of habeas corpus brought by petitioner-appellant Calvin Williams. A certificate of probable cause was issued by the Hon. Thomas C. Platt on February 17, 1976.

B. Statement of Facts

On August 9, 1970, an automobile collision occurred when a motor vehicle in operation suddenly collided with two parked vehicles in front of 213 Marian Street, Brooklyn, New York. Thereafter, on or about June 26, 1972, the appellant, being then a witness before a Kings County Grand Jury, did give testimony to the effect that he himself was the operator of the above-mentioned vehicle, which had caused the collision. The Grand Jury in question was investigating the facts and circumstances surrounding that accident.

Pursuant to Kings County Indictment No. 1404/1971 (13a-15a)*, the People of the State of New York charged the appellant with the crime of Perjury in the First Degree (New York Penal

* Numerical references, unless otherwise stated, are to appellant's appendix.

Law §210.15) and alleged that the above-mentioned Grand Jury testimony offered by the appellant was in fact untrue and that another person had been in actuality the operator of the automobile in question.

After the evidence at trial had been offered, and during summation, defense counse had argued to the jury in effect that no proof of ownership of the automobile in question had been submitted by the People and that such could have been easily obtained since "if you send $2 the registered owner of this car is John Jones at 777 Stuyvesant Avenue" (Petitioner-Appellant's Exhibit at A96-A97).

The Assistant District Attorney, during his closing remarks (19a), stated that the ownership of the car:

> ". . . does not have a bearing on this case because like the People could pay $2 and get the owner and do a little investigation, the defendant could pay the $2 and do a little investigation, although he doesn't have to. Make no bones about that. But he could have if he wanted to."

No objection to the foregoing remarks was recorded by defense counsel.

Subsequently, pursuant to the request of defense counsel (20a), the Justice of the Supreme Court presiding at the trial herein instructed the jury in part as follows (26a-27a):

> "Now I want to make it clear to you that under our law, the defendant may testify as a witness in his own behalf. In this case the defendant did not take the

> stand in his own behalf. However, the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn."

Thereafter, defense counsel stated the following (48a):

> ". . . I respectfully take exception to the court's charge with respect to the failure of the defendant to take the stand on the grounds that the opinion of counsel was inadequate [sic] to cover the particular point."

After its deliberations, the jury found appellant guilty of the crime of Perjury in the First Degree, judgment upon which was entered on December 27, 1974, sentencing him to a term of imprisonment in the New York City Department of Correctional Services for a period of six months. Such judgment was affirmed by the Appellate Division of the Supreme Court, Second Department, on June 19, 1975, with leave to appeal to the New York Court of Appeals having been denied on December 10, 1975, by the Hon. Jacob Fuchsburg, Associate Judge.

By a judgment filed on January 29, 1976, Calvin Williams' petition for a writ of habeas corpus raising the issues now before this Court for review, was denied by the Hon. Thomas C. Platt, a Judge of the United States District Court for the Eastern District of New York, upon a memorandum and order dated January 27, 1976. Appellant appeals to this Court pursuant to a Certificate of Probable Cause issued by Judge Platt and filed on February 17, 1976.

ARGUMENT

THE INSTRUCTIONS OF THE TRIAL JUDGE REGARDING APPELLANT'S FAILURE TO HAVE TESTIFIED, AS WELL AS THE COMMENTS OF THE PROSECUTOR, NEITHER OF WHICH WAS APPROPRIATELY PROTESTED, DID NOT INFRINGE UPON APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION NOR SHIFT THE BURDEN OF PROOF TO THE DEFENSE.

The essential point raised by appellant Calvin Williams is that the trial court erred in charging the jury that "the defendant may testify as a witness in his own behalf" (emphasis supplied), when it should have stated that the defendant had a right not to testify. Also attacked are certain comments of the Assistant District Attorney uttered in the course of his summation which are alleged to have shifted the burden of proof to the defense. In light of the deficient exception recorded by trial counsel in the former instance, and the lack of any objection in the latter, and more significantly, considering the force of law to the contrary on the substantive questions raised, such contentions must necessarily fail.

A.

We initially address ourselves to the viability of the trial counsel's exceptions regarding the court's instructions on Williams' failure to have testified. As noted in the Statement of Facts, counsel's reaction to the judge's remarks was that:

> "I respectfully take exception to the court's charge with respect to the failure of the defendant to take the stand on the grounds that the opinion of counsel was inadequate [sic] to cover the particular point."

What this actually means, in view of counsel's failure to have further amplified the rationale behind his misgivings, cannot properly be gleaned, even from appellant's retrospective analysis. The substance of the defendant's complaint was simply not imparted to the trial judge at the time when any error - if at all extant - might have been rectified.

In this regard:

> ". . . The purpose of an objection or exception is to direct the attention of the trial court to a definite proposition of law in reference to which it is claimed the court has erred, to the end that the court may reconsider, and if convinced that it has erred, change its ruling so that injustice and mistrials due to inadvertant errors may thus be obviated." 23A C.J.S. Criminal Law §1347 at p. 943.

Thus the prime reason for the requirement of an appropriate exception is to afford the trial judge an opportunity to remedy any error he might have committed. Undoubtedly, by counsel's deficient remarks in the matter before us, the court could in no way have been so positioned.

Further, and most paramount, when considering the overriding ambiguity inherent in the "exception" interposed by counsel herein:

> ". . . as a general rule, a general exception to the charge or to a portion thereof, which embraces several distinct propositions, without pointing out the

> specific parts objected to, is insignificant if any part of the charge or portion thereof is correct. . ."*
> 23A C.J.S. Criminal Law, §1345, at p. 939.

See also, United States v. Van Drunen, 501 F. 2d 1393 (7th Cir. 1974), cert. denied 419 U.S. 1091 (1974) (relied upon by the court below on other grounds); United States v. Martin, 511 F. 2d 148, 152 (8th Cir. 1975) (cited by appellant); United States v. Carson, 464 F. 2d 424 (2d Cir. 1972), cert. denied 409 U.S. 949 (1972); United States v. Indiviglio, 352 F. 2d 276 (2d Cir. 1965) (en banc), cert. denied 383 U.S. 907 (1966).

Accordingly, in the absence of what on appeal - including that from a denial of a petition for a writ of habeas corpus - can be determinately demonstrated to have been "plain error," the failure to have recorded an appropriate protest will preclude review of any alleged defect. See, United States v. Indiviglio, supra; United States v. Brawer, 482 F. 2d 117, 130 n. 18 (2d Cir. 1973) on remand 367 F. Supp 156 (S.D.N.Y. 1973), on appeal 496 F. 2d 703 (2d cir. 1974), cert. denied 95 S. Ct. 628 (1974); United States v. Aloi, 511 F. 2d 585, 603 (2d Cir. 1975), cert. denied _____ U.S. _____; United States v. Jenkins, 510 F. 2d 495, 499 (2d Cir. 1975).

Appellant Williams would obviate these prerequisites (embodied also in the specific prescriptions of Federal Rules

* It is indisputable that the succeeding portion of the court's instruction (viz. that "the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn") was a correct pronouncement of the law - see, infra, Part B.

of Criminal Procedure, Rule 30), by arguing (Appellant's Brief at page 12) that "in the instant matter, the standard for reserving an issue for appellate review was governed by state statute (New York Criminal Procedure Law §470.05[2]), rather than federal, and was duly satisfied by counsel's exception . . ." We disagree.

Indeed, the matter sub judice has to date been reviewed by the Appellate Division, Second department, and by an Associate Judge of the Court of Appeals, upon application for leave to appeal to that Court. By their respective dispositions, this procedural contention, having been amply considered in the appropriate state forums under statutory provisions controlling therein, has continually been found unavailing. Consequently, whereas, at this point in time, in the course of federal habeas corpus proceedings, jurisdiction in the first instance is invoked by 28 U.S.C. §§2241 and 2254, "the determination of course must be made according to federal and not state standards." Schultz v. Yeager, 293 F. Supp. 794, 803 (D. N.J. 1967), aff'd 403 F. 2d 639 (3d Cir. 1968), cert. denied 394 U.S. 961 (1969). It is therefore respectfully submitted that the question of the trial judge's instructions regarding appellant's failure to have testified is not properly reviewable at this time.

B.

The merits of the question raised by appellant are equally as unconvincing. Clearly, any distinction to be drawn between a judge's stating that a defendant may testify, as opposed to a defendant's having a right not to testify, especially where the jury is specificaly instructed not to draw any inference from the defendant's failure to have taken the stand, is grossly more apparent than real.

In this context, while Van Drunen, supra, is concededly not germane to this point (since the issue therein was held not reviewable due to the absence of an appropriate exception - compare Part A, supra), it remains most instructive to the extent that the greater error involved therein (i.e., that the court instructed on the standard for evaluating the defendant's testimony, where in fact, he hadn't taken the stand) was held to have been neutralized by the court's accompanying comment that "no presumption of guilt or any inference against the defendant may be drawn." Thus, whereas in this case, the jury was presumably itself aware that the appellant had a right to testify had he so elected (its members' lives having undoubtedly not been lived in a vacuum):

> "Any meaningful inquiry into whether this error [of telling the jury that the defendant may testify] is harmless, must focus on whether the jury was inclined to draw an improper inference, and not simply whether the jury was reminded of a fact which it already knew."

(United States v. Van Drunen, supra, p. 1396; emphasis supplied.)*

Appellant, in attempting to distinguish Van Drunen, supra, aside from alluding to that aspect noted above, claims, in part, that Van Drunen grew out of a conviction for illegally transporting aliens while the case at bar involves a perjury before a Grand Jury. When such argument is considered in light of Boehm v. United States, 123 F. 2d 791 (8th Cir. 1941), cert. denied 315 U.S. 800 (1941), reh. denied 315 U.S. 828 (1942) - the other case cited by Judge Platt below - its frailties become readily apparent.

In Boehm, there was also involved a perjury conviction and while there, the crime was committed before a hearing conducted before the Securities and Exchange Commission, the construction of the court's charge concerning the defendant's failure to have testified is entirely relevant to the matter before us. In that case, the judge, amplifying his remarks on the defendant's right not to testify, noted that (p. 810):

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* Human experience in this country would also dictate that the members of the jury were further cognizant that a defendant need not testify, if he is of such mind - "pleading the Fifth Amendment" being an often-times publicized cause celibre. What they presumably would not have known themselves, however, and what was imparted to them by the judge, is that such failure to testify should not compel any unfavorable inference that they might be otherwise disposed to draw.

> ". . . the defendant has the right under the law to be sworn as a witness in his own behalf, and testify or not as he may be advised . . . "

The judge, however, as did the court herein, supplemented his remarks with the statement that "no adverse inference whatsoever against the defendant" may be drawn. Thereafter, on appeal, the Eighth Circuit resultantly held that "the defendant was fully protected in his right to refrain from testifying."

To be sure, the overriding concern in all such instances wherein the judge's charge on the defendant's failure to testify (recognizing that "no special formula or prescription of words is requisite" [United States v. Smith, 392 F. 2d 302, 303 (4th Cir. 1968)])*, is singularly that it be explained to the jury that no adverse inference whatsoever may be drawn (Van Drunen, supra; see, also, United States v. Clarke, 468 F. 2d 890 [5th Cir. 1972] (citing Bruno v. United States, 308 U.S. 287 (1939), and Griffin v. California, 380 U.S. 609, 615, n. 6 [1965], reh. denied 381 U.S. 957 [1965]).

Further, in examining the charge, in order to determine if it passes constitutional muster in this regard, the instructions taken as a whole are what is controlling. See United States v. Van Drunen, supra; United States v. Martin, supra; United States v.

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* It is noted, parenthetically that the trial court's phraseology in the case at bar, contrary to appellant's assertions, was in fact in conformity with the governing statutory provisions (see New York Criminal Procedure Law §300.10[2]).

Agueci, 310 F. 2d 817, (2d Cir. 1962), cert. denied sub nom. Guippone v. United States, 372 U.S. 959 (1963), United States v. Warren, 120 F. 2d 211, 212 (2d Cir. 1941), and cf. United States v. English, 409 F. 2d 200 (3d Cir. 1969) (where it was held error, when that aspect concerning the jury's duty to disregard appellant's failure to testify was omitted by the trial judge). When such constitutional prerequisites receive compliance in the context of the charge in its entirety, as was accomplished in the case now under review, no infirmity arises and a writ of habeas corpus is not mandated.

Appellant Williams' cited authorities are not controlling. Here, no negative inference, in the absence of even a request by the defendant, was drawn as against the accused for not testifying, nor was the jury implicitly imbued with the suggestion that he had had something to hide (see People v. McLucas, 15 N Y 2d 167, 256 N.Y.S. 2d 799 [1965]). Additionally, the judge did not go well beyond the perimeter of the statute's strictures, thereby transmitting the tacit suggestion that the evidence of the believable witnesses who did take the stand, vis. à vis. the defendant, who did not, was preeminent. (See People v. Manning, 278 N.Y. 40, 15 N. E. 2d 181 [1938].) As we have consistently argued in preceding forums, there is a broad distinction between where a judge states that a defendant refused to testify and that at bar, where the court

merely recognized that the appellant, despite his right to do so, had no obligation to take the stand.

Further, as we have also previously urged, the instructions given herein were not unsolicited comments by the Court, which infringed upon Williams' constitutional right to remain silent (see, e.g., Redfield v. United States, 315 F. 2d 76, 80 [9th Cir. 1963]; Davis v. United States, 357 F. 2d 438, 441 [5th Cir. 1966]), but instead were specifically given at the behest of this appellant, who, in effect, was allowing his silence to be called to the jury's attention (20a).*

Considering all the foregoing, appellant Williams, at the trial judge's hands, was not constitutionally compromised.**

C.

Concerning appellant Williams' argument (pages 19-21 of his brief) that the prosecutor at trial had also trespassed upon his rights, we note the complete absence from the record of any objection in regard thereto, on the part of trial counsel. Accordingly, if the court's comments, as previously discussed,

* Were the request not given, concededly, as a matter of New York State law, any instruction would have been error (New York Criminal Procedure Law §300.10[2]). But compare United States v. Rimanich, 422 F. 2d 817, 818 (7th Cir. 1970).

** It is also respectfully submitted to this Court that assuming, for argument only, the judge's comments were in fact error, the decision of Chapman v. California, 386 U.S. 18 (1967), as cited by the appellant, would effectively inure to his detriment, since in view of the absolutely overwhelming evidence of perjury adduced at trial - to which the entire transcript would attest - such is certainly regardable as "harmless beyond a reasonable doubt."

are not properly preserved for review, in the absence of a more specific exception (since not constituting "plain error") (see Part A, supra), it follows perforce, that the prosecutor's statements are not properly raised at this time in the absence of any protest.

In any event, as to the substance of Williams' allegations that the Assistant District Attorney placed him in a position where "he must testify," such is surely a hyperbolic interpretation of the record. The trial assistant's comments were only to the effect that the question was irrelevant and further, that although the "defendant didn't have to," he could also have proved the ownership of the car in question. In so concluding, the prosecutor was merely rebutting defense counsel's argument that the People could have easily proved the car's owner, but in fact, they hadn't - a point that, as urged by the prosecutor, was completely immaterial to this prosecution for a perjury concerning the identity of the driver of the car at the specific time in question. We thus adhere to our oft-repeated argument that the prosecutor's comments should be considered only in light of those of defense counsel which literally compelled their utterance, and as such, constituted fair rejoinder. As recalled by the Appellate Division for the First Department:

> "'Remarks made to the jury must be considered in their relationship to the summation made by the attorney for the defendant which had just been finished' (People v. Marks, 6 N Y 2d 67, 77, 188 N.Y.S. 2d 465 [1957]; see, also People v. Broady, 5 N Y 2d 500, 186 N.Y.S. 2d 230 [1959])" People v. Castillo, 16 A D 2d 235, 236, 226 N.Y.S. 2d 785 (1st Dept. 1962).

See, also, United States v. La Sorsa, 480 F. 2d 522, 526 (2d Cir. 1973), cert. denied 414 U.S. 855 (1973); United States v. McCarthy, 473 F. 2d 300, 305 (2d Cir. 1972); United States v. Lipton, 467 F. 2d 1161, 1169 (2d Cir. 1972), cert. denied 410 U.S. 927 (1973).

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD, IN ALL RESPECTS, BE AFFIRMED AND THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE DENIED.

Dated: Brooklyn, New York
May, 1976

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

MARK M. BAKER
Assistant District Attorney
of Counsel

CITY OF NEW YORK)
STATE OF NEW YORK)
COUNTY OF KINGS)

BEATRICE GOODMAN , being duly sworn,

deposes and says:

That she is employed in the office of the District Attorney of Kings County and is over the age of 18.

That on the 7 day of May 1976, she served the within Appellee's briefs by enclosing 2 true copy thereof in a postpaid wrapper addressed to Harold B. Foner, Esq.
Ira Leitel, Esq.
Attorney for defendant , at his office 188 Montague Street
their Brooklyn, NY 11201

and by depositing the same in a mail box located at the Municipal Building, Brooklyn, New York

Sworn to before me this

7 day of May 1976.

Beatrice Goodman

MARK M. BAKER
Notary Public, State of New York
No. 30-4507261 Qual. in Nassau County
Commission Expires March 30, 1977